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NO. 82-1709

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

JEROME S. WAGSHAL,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The District Of
Columbia Circuit

PETITIONER'S REPLY BRIEF

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The Opposition of Respondent Commonwealth of Massachusetts ("Massachusetts") to this Petition for writ of certiorari is incorrect on several key areas. Correction of these errors highlights why certiorari should be granted.

I. THIS IS NOT A CONTRACT CLAIM

Massachusetts mischaracterizes petitioner's fee petition in the lower court as "a fee collection action," i.e., "a simple contract claim" by an attorney made against a former client to collect a fee. Were that premise true, the conclusion would follow that the Eleventh Amendment bars this action--absent waiver.*/

However, the premise is incorrect.

Petitioner's claim against Massachusetts is not based on contract. Rather, it is an application on equitable grounds for award of a class action attorney's from a benefitting class member. This Court has had a

*/ As to waiver, see infra, p. 8.

long history of defining the parameters of such class fee awards, stretching from early decisions such as Trustees v. Greenough, 105 U.S. 527 (1882) and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1884), to the landmark holding in Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), to more recent decisions such as Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

Massachusetts' opposition completely ignores the principle of the class action fee award and also ignores Sprague and Alyeska, the seminal class action fee decisions which are relied upon in the petition.

The central issue presented by this petition, which merits determination by this Court, is whether a state may be required to pay its share of a class action fee award regardless of the Eleventh Amendment. This is a finely-honed, specific legal issue going to an important Constitutional provision.

Massachusetts has never questioned the power of the district court to make such an award from a common fund recovered by the attorney for the benefit of the class which includes sovereign states among its members. The issue presented here is an important variant, namely, can the benefitting class member which is a sovereign state be required to pay its aliquot share of such an equitable fee award directly to the attorney when, as here, the award cannot be taken from the common pot. In Alyeska, supra, 421 U.S. at 257, this Court reconfirmed

> ...the historic power of equity to permit the trustee of a fund or property...to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. [Emphasis added; fn. omitted.] */

*/ This quote speaks in terms of recovery to the party. However, in Central Railroad & Banking Co. v. Pettus, supra, this Court established that the same principles apply to fee awards paid directly to the attorney for the class.

The issue presented here is whether the second of those two alternatives--payment by the benefitting class member as well as the fund--is available when the benefitting class member is a state.

II. THIS CASE RAISES AN OPEN ISSUE

Much of Massachusetts' opposition is devoted to a detailed listing of why the facts of this case differ from those in Hutto v. Finney, 437 U.S. 678 (1978). For example, Massachusetts points out that in Hutto this Court sanctioned fee awards against states who appeared in litigation as defendants whereas here the states are plaintiff class members. Mass. op. at 8-9. Massachusetts notes further that it has not been found to have acted in bad faith, one basis for the fee awards approved in Hutto.

The short answer to all these arguments is that they establish that the issue raised by this petition is one ripe for decision by this Court because it was not resolved by an

"all fours" ruling in Hutto. Just as Hutto merited the grant of certiorari to provide a vehicle for an important ruling on the applicability of the Eleventh Amendment to the exceptions to the so-called "American rule" involved in that case, so, too, does this case provide an equally important vehicle for ruling on the applicability of the Eleventh Amendment to the class action fee awards.

The nature of the issue to be decided can best be understood in the context of the holding in Alyeska, supra, 421 U.S. at 257-259. At those pages, this Court reviewed the "judically fashioned exceptions to the general rule against allowing...attorneys' fees."*/ Included in this list was the authority to award fees against a party acting in bad faith or willful disobedience of court orders, as well as the traditional authority to award class action fees "from the fund or property itself or directly from the other parties enjoying the benefit." In Hutto, the bad

*/ This "general rule" is usually referred to as the "American rule" to distinguish it from the contrary rule in England.

faith basis for fee award was endorsed as available against a state litigant, as well as the exception for "costs." This petition presents the issue of whether another exception on the same list of exceptions presented in Alyeska, the class action fee award, is likewise available against a state litigant.

In short, Hutto appears to hold that all exceptions to the "American rule" fall outside the bar of the Eleventh Amendment, but the lower courts ruled otherwise without any analysis of this issue. There would appear to be no basis in logic or law to have a different rule for class action fee awards from the rule for other types of exceptions to the American Rule. If a state which has lost a case and gotten nothing from the litigation can be required, regardless of the Eleventh Amendment, to pay attorneys' fees as costs or because of its "bad faith," why should not a state which has received many millions of dollars in

benefits as a benefitting plaintiff class member likewise be required to pay a reasonable attorney's fee for the benefit it has received?

Prior decisions indicate an affirmative answer to this central issue, but none has had to face it squarely. The petition should be granted so that this issue can be addressed by this Court, and the pattern of law made consistent.

III. MASSACHUSETTS' TELEGRAM WAS A WAIVER

Massachusetts errs in claiming that it has not waived its Eleventh Amendment immunity.*/ It mischaracterizes its telegram with petitioner as a document which "might be sufficient to create a contract between [it and] Mr. Wagshal," but which does not

*/ The waiver issue is reached only if Massachusetts' view of petitioner's claim is accepted, i.e., that it is a claim on a contract. Petitioner maintains, however, that the wording of the telegram contract negates this position and that he is seeking a non-contractual equitable award contemplated by the telegram. See text, infra.

confer any right to sue in federal court. That position ignores the clear words of the telegram by which Massachusetts agreed to be subject to a federal fee award proceeding.

The telegram states specifically that Massachusetts agreed that petitioner

> MAY PLEAD A CLASS ACTION ON BEHALF OF OTHERS SIMILARLY SITUATED; [and that] MASSACHUSETTS WILL PAY ONLY ITS APPROPRIATE SHARE OF ANY CLASS ACTION FEE AWARD....

Petition, App. 9a. It would be difficult to conceive of a more specific agreement to pay a fee award made by the district court and a waiver of the Eleventh Amendment.

Again, this is a clearcut issue deserving of review by this Court.

The waiver issue, if reached, raises important Eleventh Amendment concerns and deserves consideration by this Court, because the adverse determinations by the lower courts

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*/ By error, the issues of non-contractual class action fee award and waiver of a contract (if there was a contract) were somewhat confusingly intertwined in the original petition at pp. 9-10. However, petitioner views these as separate issues.

are at variance with a long line of decisions of this Court which permit waiver, starting with Clark v. Barnard, 108 U.S. 436 (1883).

CONCLUSION

Important issues of law are presented by this petition which have never been squarely decided by this Court. These issues fall in the middle of a well-developed, but now incomplete pattern of law which should be completed by a review of this case. It is important as a practical matter to establish whether an attorney who represents a class which includes state class members must risk going unpaid after conferring the benefits of his work on the class.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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